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FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 25) MM Docket No. 93-25
of the Cable Television Consumer)
Protection and Competition Act of 1992)
)
Direct Broadcast Satellite)
Public Service Obligations)

SUPPLEMENTAL COMMENTS OF DIRECTV, INC.

DIRECTV, Inc.¹ hereby submits the following comments in response to the Commission's Public Notice soliciting updated comment in the above-captioned proceeding.²

I. INTRODUCTION & SUMMARY

In Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), Congress added new Section 335 to the Communications Act of 1934,³ and directed the Commission to initiate a rulemaking to impose certain public interest and program carriage obligations on direct broadcast satellite ("DBS") providers. After initially being held unconstitutional by a federal district court⁴ and working its way through the process

¹ DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and majority-owned subsidiary of HE Holdings, Inc., a Delaware corporation.

² See Public Notice, "Comments Sought in DBS Rulemaking," FCC 97-24 (Jan. 31, 1997).

³ See 47 U.S.C. § 335.

⁴ *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993).

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of judicial review, Section 335 now has been upheld as constitutional.⁵ Accordingly, the Commission has decided to “freshen” the record in the above-captioned proceeding.

In its Comments and Reply Comments submitted in 1993,⁶ DIRECTV readily acknowledged its public interest responsibilities under Section 335 but cautioned the Commission to avoid adopting measures that would stunt the growth and development of the nation’s most competitive and viable multichannel alternative to cable television. DIRECTV urged the Commission, in implementing Section 335, to encourage DBS providers to pursue innovative programming arrangements and creative packaging of noncommercial programming, and argued that the Commission need not and should not relegate noncommercial DBS educational or informational programming to a *de facto* “graveyard” of unwatched PEG or leased access-type channels.

Four years later, DIRECTV’s fundamental position has not changed. In fact, the rapid development and deployment of DBS services by multiple providers over the past three years only highlights the need for the Commission to resist imposing upon DBS providers excessive or unrealistic obligations, or constraining unduly the types of programming that DBS licensees can obtain to satisfy their public interest obligations. According to the Commission’s Third Annual Report on the status of competition in the multichannel video programming distributor (“MVPD”) marketplace, DBS subscribership has increased substantially to the point that DBS systems have a higher combined subscribership than any other MVPD alternative to

⁵ *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

⁶ See Comments of DIRECTV, Inc., MM Docket No. 93-25 (May 24, 1993); Reply Comments of DIRECTV, Inc., MM Docket No. 93-25 (July 14, 1997).

incumbent cable systems.⁷ While this finding is promising, the Third Annual Report also found that incumbent cable television operators continue to be the primary distributors of multichannel video programming, that local markets for the delivery of video programming remain highly concentrated, and that structural conditions remain in place for cable operators to exercise substantial market power.⁸ Thus, it is vital that the Commission continue to develop policies that permit DBS providers to develop innovative service offerings unhindered by excessive regulation, with specific public interest responsibilities undertaken in a manner that does not undercut robust competitive development.

DIRECTV always has embraced the requirements of Section 335 of the Act because DIRECTV strongly believes that noncommercial educational or informational programming can be attractive and widely viewed. The Commission, however, must create a regulatory environment to make this so. As explained below, DIRECTV's specific recommendations include the following:

- **4% Capacity Reservation**

DBS is still an emerging industry, the most viable source of competition to incumbent cable television operators, and should not be over-regulated. The Commission should initiate the Section 335 obligation by requiring DBS providers to reserve 4% of their system channel capacity for noncommercial educational or informational programming, with "channel" defined to mean a video channel offered to the public.

⁷ In the Matter of Assessment of the Status for Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Third Annual Report (released Jan. 2, 1997), at ¶ 38 ("Third Annual Report").

⁸ *Id.* at ¶ 4.

- **Broad Construction of “Noncommercial Educational or Informational Programming”**

Section 335 can and should be construed by the Commission to permit DBS providers as much flexibility as possible in tailoring public service programming to their national audiences.

Though DBS providers cannot exercise “editorial control” over such programming, they should be encouraged to package attractive public service programming as they see fit, and to choose such programming from a “pool” of quality noncommercial educational or informational programming that is not gathered solely from an extremely limited number of sources.

- **Non-Profit Industry Clearinghouse**

DIRECTV supports the creation of a 501(c)(3) nonprofit organization that would serve as a “clearinghouse” to administer and coordinate the pool of public service programming available to DBS providers. The organization would be comprised of representatives of the DBS industry, public service organizations and educational groups, and its efforts would be directed at selecting DBS public service offerings of the highest quality for inclusion in the pool. The clearinghouse’s responsibilities would include: (1) setting standards and criteria for program eligibility; (2) screening programmer applicants that desire DBS carriage; and (3) serving as a forum for an ongoing dialogue among DBS representatives, public interest organizations and educational groups.

DIRECTV below updates and supplements the Comments and Reply Comments it submitted in 1993.

II. SECTION 335(b) CARRIAGE REQUIREMENTS FOR NONCOMMERCIAL EDUCATIONAL OR INFORMATIONAL PROGRAMMING

Section 335(b) requires DBS providers to reserve 4 to 7% of their channel capacity exclusively for noncommercial programming of an educational or informational nature.⁹ One of the most difficult issues to date has involved the degree to which Section 335 should be interpreted to allow DBS providers to choose from a broad pool of educational or informational programming, while also ensuring that the obligation is not so liberally construed that programs of little educational or informational value can be characterized as meeting the obligation. DIRECTV continues to believe that the statute contemplates -- and should be read to encompass -- a broad array of educational or informational programming that can qualify to satisfy the Section 335 carriage requirement.¹⁰

A. Initial Capacity Reservation and 4% Calculation

DIRECTV urges the Commission to set the Section 335(b) channel reservation initially at 4% for all DBS providers. DBS is still a young, emerging industry, and 4% is therefore the appropriate starting point for implementing the obligation. More importantly, due to continued advances in digital compression technology, the absolute number of channels that the 4% capacity reservation represents will continue to increase.

In addition, DIRECTV urges the Commission to accord DBS providers the discretion either (1) to set aside 4% of that channel base for dedicated "channels" of public interest programming, or (2) to convert the 4% further into a monthly amount of cumulative

⁹ 47 U.S.C. § 335(b)(1)

¹⁰ DIRECTV proposes an innovative mechanism to accomplish this objective in Section III *infra*.

exhibition time devoted to noncommercial educational or informational programming, with appropriate recordkeeping by DBS providers of the type and duration of programming provided. For such purposes, DIRECTV proposes that a “channel” be defined as a “video channel offered to the public.”¹¹ DBS providers would report to the Commission the number of total “channels” (as defined) that they offer to the public for purposes of meeting the Section 335(b) capacity reservation, and the corresponding number of channels required to be made available for noncommercial educational or informational programming would be determined as follows:

<u>Channel Estimate</u>	<u>Section 335(b) Capacity Reservation</u>
175 + channels	7 channels
150-174 channels	6 channels
125-149 channels	5 channels
100-124 channels	4 channels
50-99 channels	3 channels
25-49 channels	2 channels
< 25 channels	1 channel

Thus, for example, for a DBS provider that has a channel capacity of 150 “channels” as previously defined, the Section 335(b) obligation would be to make 6 channels of noncommercial educational or informational programming available to its subscribers.¹²

¹¹ The definition should exclude instructional or operational channels; channel guides; “barker” channels; audio-only channels (or those containing billboard-like static video); data channels; and business-only channels.

¹² Because the number of “channels” offered on a DBS system may change with the addition of more satellite capacity or through advances in digital compression technology, the capacity

Alternatively, providers that wish to translate their capacity reservation further into a “cumulative hour” approach should be permitted to do so. Using this method, providers would convert their Section 335(b) required channels into cumulative exhibition time measured in monthly increments. Thus, for a 150-channel DBS provider with a corresponding reservation requirement of 6 channels, this method would yield 6×30 days per month $\times 24$ hours per day, or 4,320 exhibition hours available on the DBS system each month for noncommercial educational or informational programming.

DIRECTV believes that the above approach is reasonable, serves the goals of Section 335, and should be adopted by the Commission. The approach meets fully the capacity reservation obligations set forth in Section 335(b), but allows a DBS provider the flexibility to adapt the obligation to its system requirements, for example, by drawing from noncommercial programming spread across a number of DBS program offerings throughout the broadcast day. For commercial programming over which DBS providers exercise some degree of editorial control, this cumulative hour approach would enable such providers to program dayparts in a manner that targets different types of public interest programming to different target audiences during peak viewing hours, rather than relegating such programming to possibly unwatched PEG or leased access-type channels. For programming over which providers do not exercise editorial control (as is the case with virtually all of the programming carried on DIRECTV’s system), the cumulative hour measurement still would provide DBS providers with the opportunity and incentive to negotiate with a much larger pool of programming suppliers to fulfill the public

reservation could be re-calculated and reported to the Commission on a yearly, going forward basis.

interest requirement, and to encourage such programmers to build quality noncommercial programming into their service offerings so that DBS providers can obtain credit for transmitting it.¹³

In sum, DBS providers should be permitted the flexibility either to dedicate certain channels to noncommercial educational or informational programming, to aggregate dayparts across a variety of channels, or to combine these options in meeting their 4% capacity reservation. The public interest and the goals of Section 335 will be served thereby.

B. Phase-In of 4% Channel Reservation

The Commission should provide for a two-year phase-in of the Section 335(b) obligation. First, DBS operators may require time to renegotiate existing programming contracts, or to negotiate new ones, in anticipation of the implementation of Section 335. Second, from an operational perspective, the necessary channel configuration for initiating public service programming may take time for DBS operators to implement, and subscribers must be notified of any changes in program availability or scheduling. Finally, the DBS industry requires time to organize and implement its voluntary “clearinghouse” proposal, which DIRECTV believes could be the focal point for the innovative and effective implementation of Section 335.¹⁴ A two-year transition period is reasonable and should be adopted by the Commission.

¹³ For example, certain programmers may decide to provide a commercial-free daily block of educational programming targeted at elementary school-aged children. The cumulative hour approach would allow DIRECTV to count such programming toward fulfillment of its program carriage obligation, and would give DIRECTV the incentive to negotiate similar deals. Approval of suitable programming by the proposed industry-wide “clearinghouse” entity also would enhance the desirability of this option. *See Section III infra.*

¹⁴ This proposal is described in Section III below.

C. “Noncommercial Programming of an Educational or Informational Nature”

A much-discussed issue in the prior comments involved the nature of the programming that should qualify as “noncommercial programming of an educational or informational nature” for purposes of subsection 335(b)(1), and specifically, the extent to which DBS providers can integrate that programming into their service packages in a way that makes business sense -- acknowledging, of course, that DBS providers are precluded under subsection 335(b)(3) from exercising any “editorial control” over video programming provided under subsection (b).

As a threshold matter, the Commission should recognize that interpreting Section 335 in a manner that permits DBS providers to “package” quality noncommercial educational and informational program channels and offerings in creative and subscriber-friendly ways does not run afoul of the Section 335(b)(3) prohibition on the exercise of “editorial control.” As the courts have recognized in the somewhat analogous context of the provision of Internet on-line services, a provider’s status as a program “packager,” which admittedly involves the exercise of some discretion by the provider in choosing which program channels to carry, generally does not rise to the level of “editorial control.”¹⁵ DIRECTV thus believes that the statute can and should

¹⁵ In a libel action against CompuServe, for example, a plaintiff claimed that defamatory statements were made in a publication carried by CompuServe in a computerized database. The court granted summary judgment for CompuServe, reasoning that:

While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication’s contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe. . . . *CompuServe has no more editorial control over such a publication than does a public library, book store or newsstand.* . .

be interpreted reasonably to allow DBS providers the flexibility to choose from a wide variety of programming that can qualify as bona fide “noncommercial educational informational” programming under the statute.

In particular, DIRECTV believes it is clear that when Congress said in subsection 335(b)(3) that DBS providers “shall meet the requirements” of subsection (b) by making channel capacity available to “national educational programming suppliers,” it created subsection (b)(3) as a *subset* of Section 335(b)(1)'s general requirement that DBS providers reserve channel capacity for noncommercial programming of an educational *or* informational nature. On its face, Section 335(b)(1) plainly contemplates that DBS providers must be permitted to choose from a wide array of qualified programming -- that is, noncommercial programming that may be either educational or informational in nature.

Four years ago, a majority of commenters agreed with this interpretation of Section 335 in determining the programming that will qualify to meet a DBS provider's carriage obligations. Both the principles of statutory construction and sound public policy mandate this result. The parties urged the Commission to encourage the development of a wide variety of quality public service programming (1) by recognizing, like DIRECTV, that “national educational programming suppliers” is a subset of a larger pool of qualified noncommercial educational or informational programming;¹⁶ and/or (2) the definition of “national educational

Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (emphasis added). In a similar fashion, DBS providers like DIRECTV make a threshold decision to carry certain program offerings on their systems, but exercise no subsequent editorial control over a channel's content.

¹⁶ See Comments of DIRECTV at 21-24; see also Comments of NATOA at 13-15 (arguing that “Congress did not intend that ‘national educational programming suppliers’ would be the only example of ‘noncommercial programming of an educational or informational nature’”).

programming supplier" -- which is drafted in non-exclusive terms -- should be read in a broad fashion to include many different types of noncommercial public service programming.¹⁷ In DIRECTV's view, both of these approaches yield the result that is plainly intended by Congress, *i.e.*, that the Commission should include within the scope of qualified programming a broad range of educational or informational offerings.¹⁸

As a matter of law, DIRECTV continues to believe that the Commission should not read subsection 335(b)(3), which specifies that DBS providers shall meet their statutory requirements by making channel capacity available to "national educational programming suppliers," to mean that such suppliers are the *exclusive* pool from which DBS providers may draw programming to satisfy their public service obligations. Had Congress intended to limit the

¹⁷ See, *e.g.*, Comments of CFA at 15-17; Comments of Discovery at 7-8; Comments of Mind Extension University, Inc. at 5-7; Comments of Primestar at 20; Comments of SBCA at 20-22; Comments of USSB at 10-11. The Commission has adopted a similarly broad and inclusive definitional approach in interpreting other sections of the 1992 Cable Act. See, *e.g.*, Complaint of WNYC Communications Group against Time Warner New York City Cable Group, *Memorandum Opinion and Order*, CSR-3748, Mass Media Bureau (released May 21, 1993), at 4 (acknowledging "broad, inclusive definition" of term "noncommercial programs for educational purposes").

¹⁸ As evidence of this intent, the Commission has appropriately noted that the House Report on the 1992 Cable Act, which discusses the language that served as the basis for Section 335, cited various types of enumerated noncommercial "public service uses." These uses were defined to include 1) programming produced by public telecommunications entities, including independent production services; 2) programming produced for educational, instructional or cultural purposes; and 3) programming produced by any entity to serve the disparate needs of specific communities of interest, including linguistically distinct groups, minority and ethnic groups, and other groups. See H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992), at 124. The Conference Report adopted this language as well. See H.R. Rep. No. 862, 102d Cong., 2d Sess. (1992) ("Conference Report"), at 100. Although the definition of "public service uses" was not retained in Section 335(b) as finally passed, Congress did retain the reference to "informational programming" in the key provision imposing the programming requirement. The legislative history of Section 335 thus provides further evidence of the broad range of programming that Congress envisioned could meet the requirement.

eligible pool of qualified programming in this fashion, it would simply have used the term "national educational programming supplier" in subsection 335(b)(1), rather than the broader language "noncommercial programming of an educational or informational nature."

Furthermore, as a matter of policy, reading the provision to require that DBS providers carry only one class of noncommercial programmer unnecessarily restricts the opportunities and incentives for DBS providers to offer the maximum possible amount of diverse and innovative noncommercial programming contemplated by the statute. In addition to noncommercial "educational" programming, DBS providers will offer noncommercial "informational" programming to their customers,¹⁹ as well as noncommercial educational programming that may be provided by sources other than national educational programming suppliers. The Commission should not read the statute in a manner that constrains DBS providers' ability to choose from the widest possible menu of qualified programming.

With respect to the types of programming that might qualify as meeting DBS provider obligations under Section 335, DIRECTV believes that current noncommercial offerings such as C-SPAN, C-SPAN2 and PBS should qualify as Section 335 programming. In addition, however, in keeping with its broad construction of the statute, DIRECTV believes that subscription and underwritten programming also should be permitted to qualify as Section 335 programming. This would depend upon whether such programming comported with criteria created by a voluntarily-created and industry-sponsored "clearinghouse" composed of DBS

¹⁹ As DIRECTV pointed out in its 1993 Comments, the public affairs programming available on C-SPAN and C-SPAN2 provides an excellent example of noncommercial informational programming that might not be counted towards meeting the requirement under a restrictive reading of the statute, but that nevertheless appears to be the kind of "informational" programming plainly contemplated by the language of the statute.

provider and public interest representatives. If particular programming were certified as “qualified” by the clearinghouse, it would be considered by the Commission presumptively to satisfy DBS provider obligations under Section 335. This “clearinghouse” proposal is described in more detail below.

III. THE COMMISSION SHOULD ENCOURAGE THE CREATION OF AN INDUSTRY-WIDE “CLEARINGHOUSE” FOR NONCOMMERCIAL EDUCATIONAL OR INFORMATIONAL PROGRAMMING

After expending much effort to reach industry consensus on effective methods of implementing Section 335, DIRECTV and other providers believe that one innovative industry-driven solution that may accommodate both the public interest goals of Section 335 and the business goals of DBS providers is the voluntary creation of an industry-wide, nonprofit “clearinghouse” entity organized as a 501(c)(3) corporation. The mission of the clearinghouse would be to identify programming that would qualify for purposes of meeting the Section 335 obligation.²⁰

With respect to the composition of the clearinghouse, DIRECTV proposes that fifty percent of its board of directors be comprised of independent members, *e.g.*, academics, educational representatives, children’s advocates, and non-DBS-affiliated commercial programmers, while the other fifty percent be comprised of DBS provider representatives.²¹ The

²⁰ In 1993, APTS recommended that the Commission create an Advisory Committee consisting of members of the public broadcasting community, DBS satellite companies, educational organizations and other interested parties to make recommendations on a comprehensive approach to implementing Section 335. *See* Comments of APTS at 31. DIRECTV’s proposal is somewhat similar in concept, although the “clearinghouse” entity would be an industry-sponsored effort rather than an entity created by the FCC.

²¹ Board members would initially be elected by industry consensus, and the entity would be self-perpetuating thereafter.

entity would be funded by the DBS industry at a set contribution rate, and would set the criteria for programming deemed to be “qualified” under the statute, with the goal of identifying and certifying a diverse pool of quality educational or informational programming from which DBS providers could then select to satisfy Section 335(b) requirements. Of course, full industry participation is critical to the viability of the proposal, since the costs of funding and operating the entity will be significant and should be spread across all providers.

Under this approach (as with DIRECTV’s purely commercial programming) no editorial control would be exercised by the DBS provider, because the provider would carry the programming content as supplied by the programmer once the decision was made to carry it, and even then, the provider would not unilaterally determine that the program meets the requirements of Section 335 -- that determination would already have been made by the clearinghouse. In particular, functions of the clearinghouse would include:

- *Setting standards and criteria for programming that qualifies as “noncommercial educational or informational programming” under Section 335*

The creation of a nonprofit clearinghouse is consistent with a broad construction of Section 335 that encourages the creation of a diverse mix of noncommercial educational or informational programming. For example, questions of whether certain underwritten programming qualifies for Section 335 purposes should be resolved by the clearinghouse, which would develop and apply realistic criteria that satisfy the language and intent of Section 335, while maximizing the number of quality public service offerings available to DBS operators. The clearinghouse also could address the appropriateness of the offering of materials either by

program suppliers or DBS providers in connection with informational or educational programming carried on DBS systems, e.g., interactive activity books or videotapes.

- *Screening the offerings of interested programmer applicants that desire carriage on DBS systems*

Certification by the clearinghouse would not be the exclusive means of identifying Section 335 programming, but such a certification would entitle DBS providers to a presumption that particular program offerings comport with Section 335 requirements. As mentioned, DIRECTV believes that current noncommercial offerings such as C-SPAN, C-SPAN2 and PBS should qualify presumptively as Section 335 programming.

- *Providing a forum for communication among DBS industry representatives and the public interest and educational community*

A very useful function of the clearinghouse would be to serve as a forum for dialogue among DBS industry representatives, public service organizations and educational groups with respect to issues that arise during implementation and administration of the Section 335 obligation. The clearinghouse also could become a vehicle for certain industry-wide voluntary commitments, such as commitments to create “industry-unique” educational or informational programming, or other related initiatives.²²

DIRECTV believes that the industry-wide, nonprofit clearinghouse proposal would have several unique advantages. Chief among these would be the assurance that only quality, truly educational or informational programming is used by DBS providers to fulfill their

²² DIRECTV would support, for example, a specific commitment by industry to provide DBS equipment and discounted subscriptions to public schools in disadvantaged areas that are local to a DBS provider’s business headquarters by a date certain.

Section 335 obligations. The clearinghouse would develop and apply criteria, consistent with the requirements of Section 335, to screen different offerings proposed for qualification by DBS providers or program producers. And the clearinghouse would then provide a "seal of approval" for a range of program alternatives that would comprise an expansive and expanding pool of high-caliber public service programming.

IV. RATES CHARGED TO NATIONAL EDUCATIONAL PROGRAMMING SUPPLIERS

The statute and legislative history of subsection 335(b)(4) indicate that the subsection contemplates a "pricing structure that was devised to enable national educational programming suppliers to utilize [a DBS provider's] reserved channel capacity."²³ The statute directs the Commission, in determining reasonable prices, to consider:

the non-profit character of the programming provider and any federal funds used to support the programming such as programming funded by the Corporation for Public Broadcasting or other federal agencies. Prices to such national educational programming suppliers are not to exceed 50 percent of the total direct costs of making a channel available, and direct costs are to exclude marketing, general administrative and similar overhead costs, as well as costs associated with lost profits.²⁴

Thus, by its terms, this part of Section 335 is applicable only to that channel capacity that DBS providers are obligated to make available on a nondiscriminatory basis to "national educational programming suppliers." It does not apply to other educational or informational programmers whose programming may satisfy the section 335(b)(1) obligation, *e.g.* programming identified by

²³ *Conference Report* at 100; see 47 U.S.C. § 335(b)(4) (expressly determining "reasonable prices under paragraph 3," *i.e.*, reasonable prices offered to "national educational programming suppliers").

²⁴ *Conference Report* at 100.

the clearinghouse as qualified but that is not offered by "national educational programming suppliers."

In determining the appropriate rates to be charged to national educational programming suppliers, DIRECTV reaffirms its position that DBS providers should be able to incorporate the primary costs of launching and distributing their DBS services. Among the elements that should be includable in a DBS provider's direct cost base are:

1. Costs of receiving program providers' signals at the DBS provider's uplink facility;
2. Costs of uplinking the signal, including continuing costs of operating and maintaining the uplink facility;
3. Personnel and administrative costs related directly to the carriage of programming offered by national educational programming suppliers;
4. Costs of construction, launch, operation and insurance of the satellite and the uplink facilities; and
5. Costs associated with the packaging and distribution of noncommercial services, including conditional access and billing.

With respect to carriage of programming provided by for-profit "national educational programming suppliers" used to satisfy the Section 335(b) requirement, DIRECTV would propose a charge equivalent to 50% of the total direct costs of making capacity available. For non-profit "national educational programming suppliers," the proposed rate would be 5% less than the for-profit rate, or 45% of total direct costs.

Yet, having identified certain costs that should in part be properly recoverable under Section 335, DIRECTV once again strongly agrees with the Commission's view in the *Initial Notice* that the assumption underlying Section 335(b) with respect to reasonable rates and costs presents an incomplete picture of how DBS providers in general -- and how DIRECTV in particular -- are likely to satisfy their public interest obligations. Section 335(b)(4) applies only to that limited situation under the statutory scheme where national educational programming suppliers lease reserved capacity from DBS providers. But as DIRECTV has repeatedly pointed out, and as the Commission has recognized, "[t]his type of arrangement . . . may not be the only way such channels are provided. For example, *DBS providers may pay a program supplier for the use of its programming or may undertake various promotional activities in exchange for other consideration.*"²⁵

This latter approach may well be how DBS providers meet their Section 335 obligations. DIRECTV, for example, may select varied and interesting noncommercial or informational programming, preferably through the industry-wide clearinghouse, and provide it as an integrated part of DIRECTV service packages. In any event, DIRECTV believes that all parties subject to or affected by the Section 335 will be best served by arrangements in which DBS providers are actively involved and have a significant interest in ensuring the highest possible viewing audience in conjunction with the integration of public service programming into their service packages.

²⁵ Notice of Proposed Rulemaking, 8 FCC Rcd 1589 (1993), at ¶ 24 ("Initial Notice") (emphasis added).

V. **SECTION 335(a) PUBLIC INTEREST REQUIREMENTS**

At this still-nascent phase of the development of DBS service, the Commission should impose as mandatory public interest obligations only those requirements explicitly set forth in Section 335(a) -- *i.e.*, the reasonable access requirement of Section 312(a)(7) and the equal opportunity requirements of Section 315 of the Communications Act. The record in this proceeding already reflects widespread agreement that the broadcast “reasonable access” and “equal opportunity” requirements should be tailored to account for the inherently national scope and non-local nature of DBS service. For example, in its original Notice of Proposed Rulemaking, the Commission correctly recognized that the feasibility of offering “reasonable access” to all federal candidates depends on the degree to which DBS is suited to localized or regionalized programming.²⁶ At present, this is not the case.²⁷ DBS is a national service, serving the entire continental United States, and permitting every federal candidate to gain mandatory access to DBS systems would impose an unreasonable and onerous burden on DBS providers that makes no policy sense in light of present DBS national service configurations. Subscribers in Florida, for example, have little interest in the elections of Representatives for Congressional districts in Wyoming. Moreover, the capacity required to provide such coverage for elections in each state would be enormous. Any reasonable access obligation applied to DBS thus should be limited to elections for national office, *e.g.*, Presidential and Vice Presidential races.

²⁶ *Initial Notice* at ¶ 51.

²⁷ Congress and the U.S. Copyright Office currently are exploring proposals to amend the copyright laws, which could allow DBS providers to obtain some capability to offer local broadcast network signals. *See* Revision of the Cable and Satellite Carrier Compulsory Licenses, Notice of Public Meetings and Request for Comments, 62 Fed. Reg. 13,396 (Mar. 20, 1997). Even if DBS providers acquire some capability to do so, however, it will be unlikely to change the fact that DBS is and should be regulated as a nationally configured service.

DIRECTV once again also urges the Commission to allow DBS providers reasonable discretion to control the placement of political advertisements in their programming. In the broadcast context, the Commission in 1991 reaffirmed its policy of trusting the “good faith judgments of licensees to provide reasonable access to federal candidates,” including the discretion to take into account their “broader programming and business commitments.”²⁸ This policy also makes good sense in the DBS arena in view of the independent editorial role that programmers play in relation to DBS providers. Reasonable access and equal opportunity requirements should apply only if DBS providers (like the major broadcast networks, for example), have retained the ability to insert advertisements into programming that they carry (e.g., for purposes of promoting the DBS service or cross-promoting other program offerings on the DBS system). To the extent that they have not, the reasonable access or equal opportunity obligations should not force intervention by the DBS provider into the business of particular programmers.

Indeed, given the general inability of DBS providers to alter daily programming schedules of the channels they carry to accommodate political broadcast time, DIRECTV believes that DBS providers should be given the flexibility to place all political advertisements on a single channel or limited number of specific channels if the provider determines that such is an optimal strategy of meeting its public service obligations. This option has record support,²⁹ and constitutes a good policy accommodation of the various interests of political candidates, DBS providers and the viewing public.

²⁸ Codification of the Commission’s Political Programming Policies, 7 FCC Rcd 678, 681 (1991).

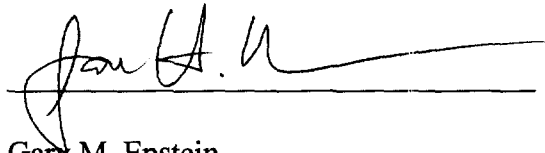
²⁹ See Initial Notice at ¶ 23; Comments of DIRECTV at 5-6; Comments of Primestar at 12; Comments of SBCA at 14; Comments of Time Warner at 3-4; Comments of USSB at 6-7.

VI. CONCLUSION

As it implements Section 335, the Commission should adopt a regulatory approach that ensures DBS providers the discretion and flexibility to effectively meet their public interest and program carriage obligations. The Commission and the public have already experienced the potential of DBS to provide a wide variety of public service uses and programming to the public apart from the provision of entertainment programming. The Commission can and should, consistent with the mandate and statutory scheme of Section 335, allow DBS providers to maximize the service's public interest potential by integrating quality noncommercial educational or informational programming into their DBS offerings.

Dated: April 28, 1997

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Gary M. Epstein", is written over a horizontal line.

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